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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 IN AND FOR THE COUNTY OF TULARE, VISALIA DIVISION

17 In re SEARCH WARRANT 013487
18 EXECUTED AUGUST 22, 2018 AT
JPMORGAN CHASE BANK

19 YORAI BENZEEVI,

20 Moving Party,

21 v.

22 SUPERIOR COURT OF THE COUNTY
OF TULARE

23 Respondent,

24 TULARE COUNTY DISTRICT
25 ATTORNEY'S OFFICE,

26 Real Party in Interest.
27
28

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

JAN 15 2019

STEPHANIE CAMERON, CLERK
BY: *[Signature]*

Case No. VSW 013487

**DR. BENZEEVI'S RESPONSE TO
PEOPLE'S BRIEF REGARDING
JANUARY 22, 2019 EVIDENTIARY
HEARING**

Date: January 22, 2019
Time: 8:30 a.m.
Dept.: 13
Judge: Hon. John P. Bianco

DR. BENZEEVI'S RESPONSE TO PEOPLE'S BRIEF REGARDING JANUARY 22, 2019 EVIDENTIARY
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JAN 15 2019 *DB*

1 Nearly five months ago, the State seized approximately \$937,000 from Dr. Yorai
2 Benzeevi's bank account pursuant to a search warrant issued by this Court. The State has not
3 charged Dr. Benzeevi with any crime. Beginning on January 22, 2019, the Court will conduct an
4 evidentiary hearing to determine whether that seizure was lawful under California law and the
5 California and the United States constitutions.

6 That evidentiary hearing should also serve as a hearing under *Franks v. Delaware*, 438
7 U.S. 154, 155–56 (1978), and related California authorities. *Franks* holds that when the target of
8 a search warrant makes a substantial preliminary showing that the warrant was obtained by a
9 "deliberate falsehood or...reckless disregard of the truth," the Fourth Amendment mandates an
10 evidentiary hearing to challenge the veracity of the affidavit. *Id.* at 171. An equivalent entitlement
11 exists under the California constitution. See *People v. Kurland*, 28 Cal.3d 376, 383–85 (1980).

12 Here, Dr. Benzeevi has made a significant preliminary showing justifying the need for an
13 evidentiary hearing. See Dr. Benzeevi's 10/26/2018 Brief in Supp. of His Mot. for Return of
14 Seized Property at 6-11 & Attach. A. He therefore enjoys a Fourth Amendment right to a *Franks*
15 hearing. Moreover, the Court has already decided to conduct an evidentiary hearing on Dr.
16 Benzeevi's motion for return of seized property, which will involve much the same evidence and
17 same factual issues as a *Franks* hearing. After all, *Franks* itself recognizes that a *Franks* hearing
18 is closely related to a standard challenge to a search warrant: "We see no principled basis for
19 distinguishing between the question of the sufficiency of an affidavit, which also is subject to a
20 post-search reexamination, and the question of its integrity." 438 U.S. at 171. It would therefore
21 be wasteful and inefficient not to address both highly interrelated issues in the same hearing,
22 particularly given that Dr. Benzeevi is entitled to a hearing on both issues.

23 The State's arguments to the contrary make no sense. First, the State contends that Dr.
24 Benzeevi is not entitled to a *Franks* hearing because a motion to suppress under Penal Code
25 section 1538.5 is only available to criminal defendants. This argument fails on multiple grounds.
26 As a threshold matter, the statutory basis for Dr. Benzeevi's motion for return of seized property
27 is Penal Code section 1539, which applies to "a person who is not a defendant in a criminal action
28 at the time the hearing is held," as well as section 1540—not section 1538.5. This flaw in the

1 State's reasoning is epitomized by the fact that the State styled its brief as an "Opposition to
2 Movant's Motion to Suppress," even though Dr. Benzeevi has never filed a motion to suppress.
3 But more importantly, Dr. Benzeevi's entitlement to a *Franks* hearing is constitutional, not just
4 statutory. *Franks* is clear that it derives directly from the Fourth Amendment—not from a state
5 statute. 438 U.S. at 172 ("if the remaining [non-perjurious] content [of a search warrant affidavit]
6 is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his
7 hearing"). And California case law similarly acknowledges that the right to challenge "deliberate
8 or negligent misstatements" in an affidavit "arises *both* from our Constitution's guarantee against
9 unreasonable search and seizure and from statutes regarding suppression of illegally obtained
10 evidence." *Kurland*, 28 Cal.3d at 383 (emphasis added). So while a criminal defendant may enjoy
11 certain statutory rights under Penal Code section 1538.5, *all citizens*—including Dr. Benzeevi—
12 are protected against unreasonable searches and seizures by the Fourth Amendment and Article I,
13 Section 13 of the California Constitution. And section 1539, which the State ignores, confirms
14 that non-criminal defendants may challenge the grounds for a search warrant. Thus, Dr. Benzeevi
15 has a clear constitutional entitlement to a *Franks* hearing, and section 1538 does not and cannot
16 provide otherwise.

17 Next, the State argues—with 140 pages of supporting exhibits—that Dr. Benzeevi's offer
18 of proof in support of his request for a *Franks* hearing was inadequate. This argument is both
19 improper and ironic. Dr. Benzeevi submitted his offer of proof in support of a *Franks* hearing—
20 including citations to dozens of evidentiary exhibits—on October 26, 2018. The State responded
21 the following week, refusing to offer any evidence until there was an "actual evidentiary
22 hearing." DA's 11/2/2018 Resp. to Dr. Benzeevi's Surreply in Supp. Of Return of Seized
23 Property and Related Evid. Hearing at 2. At the ensuing hearing, the Court agreed with the State,
24 declined to consider any evidence at that time, and set an evidentiary hearing for January 22,
25 2019. See 11/9/2018 Hearing Tr. at 18. For the State now—after insisting on an evidentiary
26 hearing—to mount an evidentiary challenge to Dr. Benzeevi's offer of proof *by motion* is
27 hypocritical and improper. The Court could not have been clearer: "I will respectfully decline to
28 look at the documents...[b]ecause I believe that [this] is a factual issue that is more appropriate

1 for an evidentiary hearing....And both parties indicated that the appropriate remedy is a hearing
2 under *McGraw* and *Ensoniq*, and I believe that's where we are headed." *Id.* Accordingly, the
3 State's attacks on the evidentiary sufficiency of Dr. Benzeevi's offer of proof are precluded by its
4 own positions and, more importantly, by Court order.

5 In any event, case law prohibits a court from considering the government's evidence when
6 evaluating the sufficiency of an offer of proof without conducting a full-fledged *Franks* hearing.
7 As the Seventh Circuit explained in *United States v. McMurtrey*, 704 F.3d 502, 504 (7th Cir.
8 2013) ("However, the court should not give the government an opportunity to present its evidence
9 on the validity of the warrant without converting the hearing into a full evidentiary *Franks*
10 hearing, including full cross-examination of government witnesses."). For this reason as well, the
11 Court should not consider the State's procedurally improper argument.

12 That said, it is notable that the State is now migrating away from the legal theories that it
13 presented to the Court in its search warrant application—an apparent acknowledgment about the
14 defects in the application. For instance, as Dr. Benzeevi explained previously, the State withheld
15 the relevant contents of the Master Services Agreement ("MSA") and Resolution 852 from the
16 Court when applying for the search warrant. *See* Dr. Benzeevi's 10/26/2018 Brief in Supp. of His
17 Mot. for Return of Seized Property at 6-11 & Attach. A. Critically, those two documents are
18 official enactments of the Tulare Local Health Care District (the "District") and they expressly
19 authorized the acts that the State now portrays as theft or embezzlement. *See Kurland*, 28 Cal. 3d
20 at 384 ("The Courts of Appeal have consistently held that an affidavit may be insufficient when it
21 omits facts adverse to the warrant application."). But the State is now trying to justify concealing
22 from the Court the MSA and Resolution 852 with the new and fanciful theory that those
23 documents were void under Government Code section 1090 (even though the District just spent
24 millions of dollars going through a painful bankruptcy process for the purpose of terminating this
25 supposedly void contract). As is becoming increasingly apparent, the State is unable to defend its
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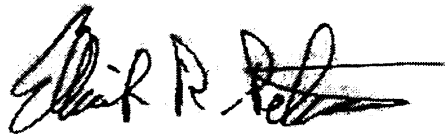
1 original search warrant application.¹

2 For the foregoing reasons, the upcoming evidentiary hearing should also serve as a *Franks*
3 hearing. In the alternative, because of the evidentiary overlap between the upcoming evidentiary
4 hearing and a *Franks* hearing, the Court can defer deciding whether to treat the hearing as a
5 *Franks* hearing until after evidence has been presented.

6 Dated: January 14, 2019

KEKER, VAN NEST & PETERS LLP

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9 By:



ELLIOT R. PETERS

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11 Attorneys for Dr. Yorai Benzeevi and
HealthCare Conglomerate Associates, LLC

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¹ The State is also attempting to hold itself to the lowest possible standard. It cites to *People v. Varghese*, for the proposition that "technical requirements for elaborate specificity have no place in the review of search warrant affidavits." 162 Cal. App. 4th 1084, 1103 (2008) (citing *United States v. Ventresca*, 380 U.S. 102, 108). But that language merely refers to the longstanding, pre-*Franks* proposition that common law pleading standards do not apply in the search warrant context. Of course, no one is attempting to impose such standards here. Rather, Dr. Benzeevi is making the common sense argument that the Court should have been notified about the MSA and Resolution 852, even if the State believes it has some implausible and counterfactual legal theory as to why they are void.

PROOF OF SERVICE

My business address is 265 East River Park Circle, Suite 310, Post Office Box 28340, Fresno, California 93729. I am employed in Fresno County, California. I am over the age of 18 years and am not a party to this case.

On the date indicated below, I served the foregoing document(s) described as **DR. BENZEEVI'S RESPONSE TO PEOPLE'S BRIEF REGARDING JANUARY 22, 2019 EVIDENTIARY HEARING** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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X

(BY MAIL) I am readily familiar with the business' practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the United States Postal Service on the date noted below in the ordinary course of business, at Fresno, California.


X

(BY ELECTRONIC MAIL) I caused delivery of such document(s), to be sent to the electronic mail address(es) of the addressee(s).

(BY OVERNIGHT COURIER) I caused the above-referenced envelope(s) to be delivered to an overnight courier service for delivery to the addressee(s).

EXECUTED ON **January 15, 2019**, at Fresno, California,

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction this service was made.


Deborah Pell